BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DANNY AYCOX Claimant VS. **NATIONAL CARRIERS, INC.** Respondent AND **LUMBERMENS UNDERWRITING ALLIANCE** Insurance Carrier AND **KANSAS WORKERS COMPENSATION FUND**	)	Docket No. 175,409

ORDER

ON the 5th day of May, 1994, the application of the Kansas Workers Compensation Fund for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Shannon S. Krysl, dated March 22, 1994, came on for oral argument in Wichita, Kansas.

APPEARANCES

The claimant appeared by and through his attorney, Thomas Hammond of Wichita, Kansas. The respondent and insurance carrier appeared by Kerry McQueen of Liberal, Kansas. The Kansas Workers Compensation Fund appeared by Cortland Q. Clotfelter of Wichita, Kansas. There were no other appearances.

RECORD

The record of the Administrative Law Judge set forth in her Award of March 22, 1994, is adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

(1) What is the nature and extent of claimant's injury and disability?

(2) Is respondent obligated to pay past medical bills contained in claimant's exhibit number one stemming from the claimant's hernia surgery?

(3) What is the liability of the Kansas Workers Compensation Fund?

(4) Was the impleading of the Kansas Workers Compensation Fund timely pursuant to K.S.A. 44-567?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

(1) Claimant is entitled to a sixty-nine percent (69%) permanent partial general body work disability as a result of injuries suffered on September 18, 1992 while employed with respondent.

Claimant, a truck driver for the respondent, was injured on September 18, 1992, when he fell between a truck trailer and loading dock after a loading dock plate had been removed. Claimant injured his ankle, both knees, his low back, his shoulder and neck. These problems resolved with the exception of his right knee and his low back. Subsequent to this injury claimant was referred to a multitude of doctor's and hospitals and underwent numerous tests and treatments. Following treatment, claimant went through a work hardening program but was unable to lift in excess of twenty-seven (27) pounds without increased back pain. He could walk approximately a half a mile before pain increased in his knee. He was prohibited from kneeling and squatting as these activities aggravated his knee and back problems. He further could not sit for extended periods of time.

As a truck driver claimant was required to sit for long periods of time, driving his truck over long distances. He would carry as much as 48,000 pounds of materials which his job required that he at times load and unload from his trailer. This required repetitive bending, lifting and twisting as much as five hundred (500) times an hour for a two hour period with the remainder of his day involved in driving. Claimant would be required to lift from twenty-five (25) to one hundred ten (110) pounds on a regular basis while loading and unloading cargo.

Claimant was examined and treated by Dr. James Odor who's medical records were stipulated into evidence. Dr. Odor released claimant with a twelve percent (12%) permanent partial impairment to the body as a whole on a functional basis and restricted

him from repetitive twisting and lifting greater than thirty (30) to forty (40) pounds. He further opined claimant would be limited to sitting three (3) hours a day, standing four (4) hours a day and walking four (4) hours a day. He could occasionally squat, crawl, climb, reach above his shoulders, crouch, kneel, and he could frequently bend and stoop and carry up to twenty (24) pounds. Occasionally he could carry from twenty-four (24) to seventy five (75) pounds.

Claimant was examined by Dr. Ernest R. Schlachter at the request of claimant's attorney. Dr. Schlachter diagnosed a bulging disc at L4-5 with minimal cervical canal narrowing evidenced on the MRI. He further found degenerative disc disease at L4-5 and spurring of the patella in the right knee. He diagnosed chronic lumbosacral strain with disc disease of the lumbar spine and chronic ligamentous injury and internal derangement of the right knee. He assessed a ten percent (10%) functional impairment to the body as a whole for the back injury and a ten percent (10%) functional impairment to the lower right extremity for the knee injury both of which, when combined, total a fourteen percent (14%) permanent partial impairment to the body as a whole. He restricted claimant from repetitive lifts in excess of twenty (20) pounds and single lifts in excess of thirty (30) pounds. He opined claimant not repetitively bend, twist or work in awkward positions and restricted him to sitting part time and standing part time. He advised against stair climbing, climbing in and out of eighteen wheel trucks, kneeling or squatting more than three (3) or four (4) times an hour and then only with assistance, and walking a maximum of one mile in an eight (8) hour day. Dr. Schlachter felt claimant was incapable of returning to over-the-road trucking and felt that vocational rehabilitation was a valid recommendation in this situation. He felt the bulge diagnosed in claimant's lumbar spine occurred as a result of the fall since claimant was asymptomatic before the injury.

Claimant was also examined and evaluated by Jeffrey P. Pardee, M.D., a board certified emergency medicine practitioner. Dr. Pardee's examination of claimant uncovered degenerative disc disease and a small disc protrusion at L5-S1. He further diagnosed soft tissue injury in claimant's lumbar spine. He assessed claimant a twelve percent (12%) functional impairment to the body as a whole. He returned claimant to work with a thirty (30) to forty (40) pound weight restriction. Dr. Pardee did find claimant to be morbidly obese and more susceptible to certain types of injuries due to his weight. He assessed claimant a functional impairment to the back as a result of his loss of range of motion secondary to his weight problems and obesity, finding no permanent impairment as a result of the September 1992 accident. He further opined claimant would be capable of passing the Department of Transportation physical and that he could return to the occupation of truck driver.

Claimant was evaluated by Karen Terrill who, after reviewing the medical records of Dr. Pardee, Dr. Odor, Dr. Schlachter and the Back Oklahoma Center found that, based upon the limitations set forth by Dr. Schlachter, claimant had suffered a fifty-six percent (56%) loss of access to the open labor market. Based upon the restrictions of Dr. Odor claimant had a sixty-eight percent (68%) loss of access to the open labor market. Ms. Terrill admitted that, with no restrictions assessed to the 1992 injury per Dr. Pardee, claimant would have no loss of access to the open labor market. She did state Dr. Pardee's restriction against bending and twisting more than twenty to thirty (20-30) times an hour would result in a ten to fifteen percent (10-15%) loss of access to the open labor market. If the additional limitations of no repetitive bending and lifting in excess of forty to fifty (40-50) pounds were considered, claimant's loss of access to the open labor market would increase to fifteen to twenty percent (15-20%). Based upon claimant's average

weekly wage of $800.32 and her finding of claimant's present ability to earn $260.00 a week, Ms. Terrill found claimant suffers a sixty-seven and one-half percent (67.5%) loss of ability to earn a comparable wage.

Claimant was also examined by Mr. Jerry Hardin who felt claimant had suffered a seventy to seventy-five percent (70-75%) loss of ability to perform work in the open labor market based upon the restrictions by Back Oklahoma Center and Dr. Odor. Using the restrictions of Dr. Schlachter, Mr. Hardin found claimant had suffered an identical seventy to seventy-five percent (70-75%) of loss of access to the open labor market. Mr. Hardin also found claimant to have suffered a sixty-seven to sixty-eight percent (67-68%) loss of ability to earn a comparable wage when using the $800.32 average weekly wage stipulated to by the parties. Mr. Hardin agreed that if Dr. Pardee's conclusions regarding claimant's lack of injuries from the 1992 injury are considered then claimant has suffered no loss of access to the open labor market and no loss of ability to earn a comparable wage.

K.S.A. 44-501(a) states in part:

> "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

> "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award of compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Company, 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

The Appeals Board finds the evidence in this case supports a finding that claimant, on September 18, 1992, suffered a serious injury while employed with respondent. As a result of that injury claimant is unable to return to his former employment as a truck driver.

K.S.A. 1992 Supp. 44-510e(a) states in part:

> "There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Based upon the review of the entire record the Appeals Board finds claimant has proven by a preponderance of the credible evidence that the presumption of no work disability contained in K.S.A. 1992 Supp. 44-510e(a) does not apply.

K.S.A. 1992 Supp. 44-510e(a) states in part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than percentage of functional impairment."

In determining the extent of permanent partial disability, both the reduction of a claimant's ability to perform work in the open labor market and the ability to earn comparable wages must be considered. This statute is silent as to how this percentage is to be arrived at. Hughes v. Inland Container Corporation, 247 Kan. 407, 799 P.2d 1011 (1990). While Hughes does indicate a balance of the two factors is required, it does not state specifically how this balance is to occur or what emphasis is be placed on each of these tests. The court does require, in arriving at a percentage, that a mathematical equation or formula be utilized. Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). Both Karen Terrill and Jerry Hardin have expressed opinions based upon the numerous medical reports in evidence as to claimant's loss of ability to perform work in the open labor market and loss of ability to earn comparable wages. The Appeals Board finds no compelling reason to place more emphasis on one test over the other and gives each equal weight. The Appeals Board further finds no compelling reason to give additional weight to the opinions of individual evaluating doctors or expert witnesses in this matter and concludes that equal weight to all is appropriate. In combining the evidence of the medical practitioners and the evidence provided by Karen Terrill and Jerry Hardin the Appeals Board finds claimant has suffered a sixty-nine percent (69%) permanent partial general work disability as a result of the injuries suffered with respondent on September 18, 1992.

(2) The evidence presented in this matter indicated that while claimant was being evaluated for problems associated with this fall in September 1992, he was also being evaluated and treated for a hernia. The Appeals Board finds that the evidence is insufficient to show claimant's hernia surgery was related to the injury of September 18, 1992. The bills associated with claimant's hernia repair and hospitalization are not authorized medical treatment and will be the claimant's responsibility and not the responsibility of respondent or its insurance carrier.

(3) The Kansas Workers Compensation Fund has no liability in this matter. At no time during his employment tenure with respondent did claimant weigh less than three hundred (300) pounds. His weight fluctuated between three hundred twenty (320) and three hundred fifty (350) pounds, with claimant standing approximately six (6) feet tall.

K.S.A. 44-567 states in part:

> "(a) An employer who operates within the provisions of the workers compensation act and who knowingly employs or retains a handicapped

employee, as defined in K.S.A. 44-566 and amendments thereto shall be relieved of liability for compensation awarded or be entitled to an apportionment of the costs thereof as follows:

(1) Whenever a handicapped employee is injured or is disabled or dies as a result of an injury which occurs prior to July 1, 1994, and the administrative law judge awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers compensation fund."

K.S.A. 44-566(b) states:

"'Handicapped employee' means one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions:

1. Epilepsy;
2. Diabetes;
3. Cardiac disease;
4. Arthritis;
5. Amputated foot, leg, arm or hand;
6. Loss of sight of one or both eyes or a partial loss of vision of more than 75% bilaterally;
7. Residual disability from poliomyelitis;
8. Cerebral palsy;
9. Multiple sclerosis;
10. Parkinson's disease;
11. Cerebral vascular accident;
12. Tuberculosis;
13. Silicosis or asbestosis;
14. Psychoneurotic or mental disease or disorder established by medical opinion or diagnosis;
15. Loss of or partial loss of the use of any member of the body;
16. Any physical deformity or abnormality;
17. Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment."

No definition of physical deformity or abnormality in the above statutory scheme is provided nor is there a definition of physical impairment, disorder or disease. Respondent argues here that morbid obesity could reasonably fall within the purview of either K.S.A. 44-566(b) subsection 16 or 17.

In Denton v. Sunflower Electric Co-op, 12 Kan. App. 2d 262, 740 P.2d 98, (1987), Aff'd 242 Kan. 430, 748 P.2d 420 (1988), referring to K.S.A. 44-567, the Court of Appeals for the State of Kansas stated:

> "Otherwise put, a 'handicapped employee' is an employee who is at a disadvantage in obtaining employment or reemployment because of physical or mental impairment with which he or she is afflicted or to which he or she is subject. An employee is not a handicapped employee if he or she is not afflicted with or subject to an impairment. An employee afflicted with or subject to an impairment is not a handicapped employee if he or she is not at disadvantage in obtaining employment or reemployment because of the impairment.
>
> What is the meaning of the word 'impairment' as it is used in K.S.A. 44-566(b) and K.S.A. 44-567? From the wording 'physical or mental impairment . . . whether congenital or due to an injury' in K.S.A. 44-566(b), it is clear that 'impairment' and 'injury' are not synonymous. What is the distinction? Seeing that K.S.A. 44-508(e) directs that 'injury' means a lesion or change in the physical structure of the body causing damage or harm thereto, we conclude that the word 'impairment' in the phrase 'physical or mental impairment' connotes limitation of function. (Citations omitted).
>
> We pause to observe that reported Kansas appellate opinions in workers' compensation cases display instances of imprecision in the use of certain words, among which are 'injury', 'impairment', and 'handicap' or 'handicapped'."

The Appeals Board does not find as a matter of law that morbid obesity is a recognized pre-existing condition which would constitute a handicap per se so as to require liability to pass on to the Workers Compensation Fund. If the legislature intended obesity to be considered as a statutory handicap, such condition could easily be included within the statutory definition of a handicapped employee. To date this has not been done. As such the Appeals Board finds that under the specific facts of this case, claimant's morbid obesity does not constitute a handicap under the statutory language of K.S.A. 44-566 and, as such, liability in this matter cannot be assessed to the Kansas Workers Compensation Fund.

(4) The pre-hearing settlement conference of November 29, 1993, does not constitute a first full hearing where any evidence is presented on the claim as is required by K.S.A. 44-567(d). The Court of Appeals in Safeway Stores, Inc. v. Workers' Compensation Fund, 3 Kan. App. 2d 283, 288, 593 P.2d 1009, (1979), held that "the first full hearing" as used in K.S.A. 1978 Supp. 44-567(c) means the first hearing before an examiner at which pre-trial stipulations are taken or testimony is presented, although it does not include a preliminary hearing as provided by K.S.A. 1978 Supp. 44-534(a). The Appeals Board finds the pre-hearing settlement conference held on November 29, 1993, does not constitute a first full hearing as is required by the statute and as such the impleading of the Workers Compensation Fund prior to the first full hearing held December 14, 1993, would be timely.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl dated March 22, 1994, be affirmed in part and reversed in part in that claimant, Danny R. Aycox, is hereby awarded compensation against the respondent, National Carriers, Inc., and Lumbermens Underwriting Alliance, its insurance carrier, for 41.14 weeks temporary total disability compensation at the rate of $299.00 per week in the amount of $12,300.86 followed by 293.31 weeks permanent partial general body work disability at the rate of $299.00 per week, not to exceed $100,000.00, for a 69% permanent partial general body work disability.

As of March 18, 1994, there would be due and owing to the claimant 41.14 weeks temporary total compensation at the rate of $299.00 per week in the sum of $12,300.86 plus 37 weeks permanent partial general body work disability at the rate of $299.00 per week in the sum of $11,063.00 for a total due and owing of $23,363.86 which is ordered paid in one lump sum less any amounts previously paid. Thereafter the remaining balance of the $100,000.00 shall be paid at the rate of $299.00 per week until fully paid or until further order of the Director.

Claimant's attorney fees are approved subject to the provisions of K.S.A. 44-536.

Additional findings of the Administrative Law Judge, so long as they are not in contradiction to this order, are hereby affirmed by the Workers Compensation Appeals Board.

Fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Barber & Associates	
Transcript of regular hearing	$320.80
Ireland Court Reporting	
Deposition of Jerry D. Hardin	$281.45
Deposition of Ernest R. Schlachter, M.D.	$204.45
Maynard Peterson & Associates	
Deposition of Jeffrey P. Pardee, M.D.	Unknown
Deposition Services	
Deposition of Karen Crist Terrill	$197.20
Deposition of David W. Cole	$296.00

IT IS SO ORDERED.

Dated this _____ day of November, 1994.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

cc: Thomas Hammond, PO Box 47370, Wichita, KS 67201-7370
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George Gomez, Director
Shannon S. Krysl, Administrative Law Judge